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## DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9755]

RIN 1545-BI91

Utility Allowances Submetering

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations that amend the utility allowance regulations concerning the low-income housing credit. The final regulations clarify the circumstances in which utility costs paid by a tenant based on actual consumption in a submetered rent-restricted unit are treated as paid by the tenant directly to the utility company. The temporary regulations extend the principles of these submetering rules to situations in which a building owner sells to tenants energy that is produced from a renewable source and that is not delivered by a local utility company. The final and temporary regulations affect owners of low-income housing projects that claim the credit, the tenants in those low-income housing projects, and State and local housing credit agencies. The text of these temporary regulations also serves as the text of the proposed regulations (REG-123867-14) set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section of this issue of the **Federal Register**.

DATES: Effective Date: These regulations are effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Applicability Date: For dates of applicability, see §§1.42-12(a)(5) and 1.42-10T(f)-(g).

FOR FURTHER INFORMATION CONTACT: James Rider (202) 317-4137 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

### **Background**

This document contains amendments to §1.42-10 of the Income Tax Regulations (26 CFR Part 1), which concerns the applicable utility allowance relating to the low-income housing credit under section 42 of the Internal Revenue Code. On May 5, 2009, the Treasury Department and the IRS released Notice 2009-44 (2009-21 IRB 1037) (see §601.601(d)(2)(ii)(b)) to provide guidance on how the utility allowance regulations apply to buildings with a submetering system. On August 7, 2012, the Treasury Department and the IRS published in the **Federal Register** a notice of proposed rulemaking under section 42(g)(2)(B)(ii) (77 FR 46987) (the 2012 proposed regulations) to provide that utility costs paid by a tenant based on actual consumption in a submetered rent-restricted unit are treated as paid by the tenant directly to the utility company and thus do not count against the maximum rent that the building owner can charge. The 2012 proposed regulations generally incorporated the guidance in Notice 2009-44. The Treasury Department and the IRS received written and electronic comments responding to the 2012 proposed regulations. No requests for a public hearing were made and no public hearing was held.

After consideration of all the comments, the final regulations adopt the 2012 proposed regulations as amended by this Treasury decision, and the temporary regulations extend those rules to the provision of energy that the building owner acquires directly from renewable sources and then provides to low-income tenants. The text of the temporary regulations also serves as the text of the proposed regulations (REG-123867-14) for purposes of the notice of proposed rulemaking on this subject in the Proposed Rules section in this issue of the **Federal Register**.

## **Summary of Comments and Explanation of Provisions**

### Comments Specifically Relating to Submetering

Commenters generally stated that the 2012 proposed regulations provided for accurate utility allowance determinations, which would promote energy efficiency and help maintain the financial stability of housing credit properties.

#### 1. Actual-Consumption Submetering Arrangements and Ratio Utility Billing Systems

The 2012 proposed regulations defined an actual-consumption submetering arrangement for utility allowance purposes as not including a ratio utility billing system (RUBS). RUBS uses a formula that allocates a property's utility bill among its units based on the units' relative floor space, number of occupants, or some other quantitative measure, but not actual consumption by the tenant(s) in the unit. A commenter expressed concern that the inability to use RUBS for utility allowance purposes could be interpreted to prohibit the use of RUBS for any low-income housing credit project. This concern is unwarranted. Although the 2012 proposed regulations precluded an arrangement such as RUBS from qualifying as an actual consumption submetering arrangement, they did not prohibit the use of RUBS for low-income

housing credit projects. However, any amount paid by a tenant for utilities using RUBS must be included in gross rent. Accordingly, the final regulations follow the approach in the 2012 proposed regulations and continue to define an actual-consumption submetering arrangement as not including RUBS.

## 2. Administrative Costs of Submetering

The 2012 proposed regulations provided that, if the owner charges a unit's tenants an administrative fee for the owner's actual monthly costs of administering an actual-consumption submetering arrangement, then the fee is not considered gross rent for purposes of section 42(g)(2) so long as the aggregate monthly fee or fees for all of the unit's utilities under one or more actual-consumption submetering arrangements does not exceed the lesser of (A) five dollars per month; or (B) the owner's actual monthly costs paid or incurred for administering the arrangement. One commenter recommended that the final regulations simply require owners to include in gross rent any amounts that exceed five dollars and not require the owner to determine actual monthly cost. According to the commenter, requiring the building owner to determine actual cost is overly burdensome and would lead to technical noncompliance as a result of nominal amounts. Two commenters requested that the final regulations also permit building owners to charge tenants an administrative fee in accordance with State law as currently permitted in Notice 2009-44. According to these commenters, this rule is regionally tuned and therefore allows building owners to recoup the full cost of submetering in a fair manner. The commenters suggested that by not allowing building owners to recover State-approved charges for electricity, the 2012 proposed regulations

would create a disincentive for developers to invest in high performance, sustainable low income housing or build additional housing units.

In response to these comments, the final regulations do not include a requirement to determine actual monthly cost, and they generally permit owners to charge tenants an administrative fee in accordance with a State or local law that specifically prescribes a dollar amount for the administrative fee. The final regulations authorize the Treasury Department and the IRS, by publication in the Internal Revenue Bulletin (IRB) (see §601.601(d)(2)(ii)), both to provide for administrative fees in excess of five dollars per month even in the absence a State or local law doing so and to put an upper bound on administrative fees even if State or local law allows higher fees.

Thus, if a building owner or its agent charges a unit's tenants a fee for administering an actual-consumption submetering arrangement, then gross rent includes any amount by which the aggregate amount of monthly fees for all of the unit's utilities under one or more actual-consumption submetering arrangements exceeds the greater of—(i) five dollars per month; (ii) an amount (if any) designated by publication in the IRB; or (iii) the lesser of a dollar amount (if any) specifically prescribed under a State or local law or a maximum amount (if any) designated by publication in the IRB.

### 3. Energy Acquired Directly from a Renewable Source

During consideration of the comments on the 2012 proposed regulations, the Treasury Department and the IRS realized that the proposed definition of an actual-consumption submetering arrangement assumed that the building owner was purchasing the utility in question from a local utility company. For example, proposed §1.42-10(e)(1)(iv) referred to “the utility company rate incurred by the building owner for

the particular utility.” This assumption appeared to preclude applying submetering principles to electricity generated from renewable sources by the building owner or by some other person from whom the building owner purchases it directly.

The legislative purposes of the low-income housing credit, however, are fully consistent with applying submetering principles to energy that is acquired without the intervention of a local utility company. Accordingly, this Treasury decision contains temporary regulations that apply those principles to energy that the building owner provides to tenants after having acquired it directly from renewable sources.

Qualification for this submetering treatment, however, depends on the charges to the tenants for this energy being comparable to local utility rates. To the extent that tenants consume this energy, charges by the building owner must not exceed the rates that the local utility company would have charged the tenants if they had instead acquired the energy from that company. Information about how to provide comments on the substance of the temporary regulations is in the notice of proposed rulemaking on this subject (REG-123867-14), which is in the Proposed Rules section in this issue of the **Federal Register**.

#### Comments Relating to Utility Allowances Generally

In addition to comments responding to the 2012 proposed regulations, the Treasury Department and the IRS received comments relating to the utility allowance regulations that existed prior to these final regulations. The final regulations incorporate certain changes suggested in those comments, as described in this preamble.

## 1. Role of Agencies Regarding the Utility Allowance Methods

Section 1.42-10(b) provides the rules for determining the applicable utility allowance based upon whether (1) the building receives rental assistance from the Rural Housing Service (RHS) (“RHS-assisted building”), (2) the building has any tenant that receives RHS rental assistance payments (“RHS tenant assistance”), (3) the rents and utility allowances of the building are reviewed by the Department of Housing and Urban Development (HUD) (“HUD-regulated building”), or (4) the building is not described in (1), (2), or (3) (“other buildings”).

For an RHS-assisted building and a building with RHS tenant assistance, the applicable utility allowance is the applicable RHS utility allowance. For a HUD-regulated building, the applicable utility allowance is the applicable HUD utility allowance. In other buildings, for all rent-restricted units occupied by tenants receiving HUD tenant assistance, the applicable utility allowance is the applicable Public Housing Authority (PHA) utility allowance established for the Section 8 Existing Housing Program. For all other tenants in rent-restricted units in other buildings, the applicable utility allowance is the applicable PHA utility allowance, a local utility company estimate, an estimate from the State or local housing credit agency (Agency) that has jurisdiction over the building, the HUD Utility Schedule Model, or an energy consumption model. See §1.42-10(b)(4)(ii) to determine which utility allowance applies.

Prior to these final regulations, the existing regulations provided that, under the energy consumption model, utility consumption estimates must be calculated by “either a properly licensed engineer or a qualified professional approved by the Agency that has jurisdiction over the building.” The 2012 proposed regulations requested comments

on whether approval by the agency with jurisdiction over the building should be required by the regulations for both properly licensed engineers and other qualified professionals or only for qualified professionals that are not properly licensed engineers.

One commenter suggested that the Agency's approval should be required for determinations by both properly licensed engineers and other qualified professionals, because the Agency should have the ability to approve or deny a utility allowance method unless the building is a RHS property or a HUD-regulated building. Other commenters suggested that Agency approval should be required only for professionals who are not properly licensed engineers. According to these commenters, the intent and benefit of a project sponsor using a licensed engineering professional is not only to receive the benefit of the third-party professional's expertise but also to simplify evaluation of the third-party by the Agency. One commenter suggested that when reviewing consumption model estimates, an Agency should need to check for only the seal of an engineer, because State certification of the engineer already imposes standards for expertise, performance, and conduct and exposes the certified individual and firm, if any, to possible sanctions through the professional certification and oversight process.

In response to these comments, the final regulations provide that Agency approval is required only for qualified professionals that are not properly licensed engineers. However, the final regulations also clarify that an Agency continues to have the option to review, and take appropriate action regarding, utility estimates based on the energy consumption model or the other optional methods.



One commenter suggested that the final regulations should clarify that an Agency has the ability to approve or deny any owner's utility allowance, unless the building is an RHS property or a HUD-regulated building. By contrast, another commenter expressed concern that the existing regulations give an Agency too much discretion to approve or disapprove any of the methods of calculating utility allowances. In particular, the commenter suggested that the final regulations require an Agency to accept utility estimates based on an energy consumption model whenever the estimate is calculated by a properly licensed engineer.

The final regulations do not adopt this latter suggestion. The existing regulations appropriately allow an Agency to approve or disapprove a method or to require certain information before permitting use of the method. Additionally, an Agency should have the ability to review the energy consumption model even when the model is used by a properly licensed engineer, who is not subject to Agency approval. Therefore, the final regulations specifically authorize an Agency to approve or disapprove use of the energy consumption model or require information about the model before permitting its use, regardless of the type of professional who calculates the utility estimates.

## 2. Use of Consumption Data for the Energy Consumption Model

Under the existing regulations prior to these final regulations, use of the energy consumption model was limited to the building's consumption data for the twelve-month period ending no earlier than 60 days prior to the beginning of the 90-day period under §1.42-10(c)(1). One commenter was concerned about the perceptions that may arise if engineering models yield allowances that are out of line with past consumption. The

commenter requested additional guidance on the development of acceptable assumptions for use in engineering models to avoid this problem.

Another commenter stated that it is unclear whether the required building consumption data refers to the calculated consumptions derived from an energy consumption model or a separate set of consumption data such as historical tenant utility billing information. According to the commenter, several Agencies that regulate the acceptable utility allowance methodologies either have had an unclear understanding of what additional information, if any, is required for an engineering analysis under the energy consumption model or have taken the position that actual historical tenant utility bills for the most recent 12-month period are necessary to process an energy consumption model utility allowance submittal.

The commenter also asserted that historical utility data may be inaccessible and, even if the data were accessible, collection of the data imposes an additional paperwork burden on property owners. The commenter further contended that historical utility billing data does not take into account energy-efficient behavior and does not promote energy conservation. According to the commenter, most utility providers do not maintain utility information beyond the most recent 12-month period. As year-to-year variations occur, the most recent 12 months may not be a representative set of consumption data to provide an ongoing utility allowance. The commenter suggested amending the energy consumption model to allow an engineering approach that analyzes specific factors including, but not limited to, unit size, building orientation, design and materials, mechanical systems, appliances, and characteristics of the building location.

For the reasons stated by the commenters, the final regulations remove the provision requiring that an energy consumption model use the building's consumption data for a particular twelve-month period. Instead, the final regulations revise the specific factors used in determining estimates under the energy consumption model to include available historical data.

### 3. Areas with No Public Housing Authorities

The existing regulations provide that, if the building is neither an RHS-assisted building nor a HUD-regulated building and no tenant in the building receives RHS tenant assistance, then the appropriate utility allowance for the units in the building is the applicable PHA utility allowance. One commenter requested clarification as to which method of calculating utility allowances applies if no PHA exists under these circumstances. Under the existing regulations, if a building owner obtains a local utility company estimate or uses one of the other options for determining the applicable utility allowance, then the selected option replaces the applicable PHA allowance as the appropriate utility allowance. The regulations do not include an option for using the allowance of a neighboring PHA.

Allowing the use of a neighboring PHA's utility allowance might not be appropriate because climate and utility consumption can be dissimilar from one PHA jurisdiction to a neighboring jurisdiction. Comments are requested on how the rules might best address situations in which no PHA exists. Comments should be submitted in the manner described in the notice of proposed rulemaking on submetering (REG-123867-14), which is in the Proposed Rules section in this issue of the **Federal Register**.

#### 4. Changes in Public Housing Authority Utility Allowances

One commenter requested that a building owner be required to check for a change in a PHA utility allowance only annually. The existing regulations provide that, if the applicable utility allowance for units changes, the building owner must use the new utility allowance to compute gross rents of the units due 90 days after the change (the 90-day period). For example, if a tenant provides a local utility company estimate that shows a higher utility cost than the otherwise applicable PHA utility allowance, then the building owner must lower the rent. The lower rent must be in effect for rent due at the end of the 90-day period. The commenter stated that a building owner must continuously monitor for changes in the PHA utility allowance because a PHA is not required to update utility allowances on a regular, fixed schedule.

The final regulations do not adopt this recommendation because it might result in tenants paying more than the gross rent amount under section 42(g)(2). If a PHA utility allowance were to change after the one-time date suggested by the commenter, then tenants would pay a higher rent until the next annual date to review the PHA utility allowance and the higher rent might exceed the gross-rent limit under section 42(g)(2). Compliance with the 90-day period does not require continuous monitoring. A building owner that checks the PHA utility allowance every 60 days would have at least 30 days in which to adjust rents.

#### 5. HUD-Regulated Building

Prior to these final regulations, the existing regulations defined a HUD-regulated building as one in which neither the building nor any tenant in the building receives RHS assistance and the rents and utility allowances of the building are reviewed by HUD on

an annual basis. One commenter recommended amending this definition because HUD does not review the rents and utility allowances on an annual basis for all HUD programs. In response to this comment, the final regulations define a HUD-regulated building to mean one in which the rents and utility allowances of the building are regulated by HUD.

#### 6. Disclosure to Tenants

One commenter suggested that the final regulations address how utility estimates are to be made available to all tenants in the building. Because circumstances may vary and different reasonable options may exist, the final regulations do not adopt this suggestion.

#### Comments

Information about how to provide comments is in the notice of proposed rulemaking on this subject (REG-123867-14), which is in the Proposed Rules section in this issue of the **Federal Register**.

#### Table of Contents

The final regulations update the table of contents to include all of the current provisions under section 42.

#### **Effect on Other Documents**

Notice 2009-44 (2009-21 IRB 1037) is obsolete for taxable years beginning on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

#### **Statement of Availability of IRS Documents**

Notice 2009-44 is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, or by visiting the IRS website at <http://www.irs.gov>.

### **Special Analyses**

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking that preceded these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business. No comments were received.

### **Drafting Information**

The principal author of these regulations is David Selig, Office of the Associate Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the Treasury Department and the IRS participated in their development.

### **List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

### **Adoption of Amendments to the Regulations**

Accordingly, 26 CFR part 1 is amended as follows:

## PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 \* \* \*

Section 1.42-10T also issued under 26 U.S.C. 42(n); \* \* \*

Par. 2. Section 1.42-0 is amended by:

1. Revising the introductory text.
2. Revising the heading and adding entries for §1.42-1.
3. Adding entries for §1.42-1T.
4. Adding entries for §§1.42-3 through 1.42-18.

The additions and revisions read as follows:

### §1.42-0 Table of contents.

This section lists the paragraphs contained in §§1.42-1 through 1.42-18 and §1.42-1T.

§1.42-1 Limitation on low-income housing credit allowed with respect to qualified low-income buildings receiving housing credit allocations from a State or local housing credit agency.

- (a) through (g) [Reserved]
- (h) Filing of forms.
- (i) [Reserved]
- (j) Effective dates.

§1.42-1T Limitation on low-income housing credit allowed with respect to qualified low income buildings receiving housing credit allocations from a State or local housing credit agency (temporary).

- (a) In general.
  - (1) Determination of amount of low-income housing credit.
  - (2) Limitation on low-income housing credit allowed.
- (b) The State housing credit ceiling.
- (c) Apportionment of State housing credit ceiling among State and local housing credit agencies.
  - (1) In general.

- (2) Primary apportionment.
- (3) States with 1 or more constitutional home rule cities.
  - (i) In general.
  - (ii) Amount of apportionment to a constitutional home rule city.
  - (iii) Effect of apportionment to constitutional home rule cities on apportionment to other housing credit agencies.
  - (iv) Treatment of governmental authority within constitutional home rule city.
- (4) Apportionment to local housing credit agencies.
  - (i) In general.
  - (ii) Change in apportionment during a calendar year.
  - (iii) Exchanges of apportionments.
  - (iv) Written records of apportionments.
- (5) Set-aside apportionments for projects involving a qualified nonprofit organization.
  - (i) In general.
  - (ii) Projects involving a qualified nonprofit organization.
- (6) Expiration of unused apportionments.
- (d) Housing credit allocation made by State and local housing credit agencies.
  - (1) In general.
  - (2) Amount of a housing credit allocation.
  - (3) Counting housing credit allocations against an agency's aggregate housing credit dollar amount.
  - (4) Rules for when applications for housing credit allocations exceed an agency's aggregate housing credit dollar amount.
  - (5) Reduced or additional housing credit allocations.
    - (i) In general.
    - (ii) Examples.
  - (6) No carryover of unused aggregate housing credit dollar amount.
  - (7) Effect of housing credit allocations in excess of an agency's aggregate housing credit dollar amount.
  - (8) Time and manner for making housing credit allocations.
    - (i) Time.
    - (ii) Manner.
    - (iii) Certification.
    - (iv) Fee.
    - (v) No continuing agency responsibility.
- (e) Housing credit allocation taken into account by owner of a qualified low-income building.
  - (1) Time and manner for taking housing credit allocation into account.
  - (2) First-year convention limitation on housing credit allocation taken into account.
  - (3) Use of excess housing credit allocation for increases in qualified basis.
    - (i) In general.
    - (ii) Example.
  - (4) Separate housing credit allocations for new buildings and increases in qualified basis.
  - (5) Acquisition of building for which a prior housing credit allocation has been made.
  - (6) Multiple housing credit allocations.



- (f) Exception to housing credit allocation requirement.
  - (1) Tax-exempt bond financing.
    - (i) In general.
    - (ii) Determining use of bond proceeds.
    - (iii) Example.
  - (g) Termination of authority to make housing credit allocation.
    - (1) In general.
    - (2) Carryover of unused 1989 apportionment.
    - (3) Expiration of exception for tax-exempt bond financed projects.
- (h) [Reserved]
- (i) Transitional rules.

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§1.42-3 Treatment of buildings financed with proceeds from a loan under an Affordable Housing Program established pursuant to section 721 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).

- (a) Treatment under sections 42(i) and 42(b).
- (b) Effective date.

§1.42-4 Application of not-for-profit rules of section 183 to low-income housing credit activities.

- (a) Inapplicability to section 42.
- (b) Limitation.
- (c) Effective date.

§1.42-5 Monitoring compliance with low-income housing credit requirements.

- (a) Compliance monitoring requirement.
  - (1) In general.
  - (2) Requirements for a monitoring procedure.
    - (i) In general.
    - (ii) Order and form.
    - (iii) [Reserved]
  - (b) Recordkeeping and record retention provisions.
    - (1) Recordkeeping provision.
    - (2) Record retention provision.
    - (3) Inspection record retention provision.
  - (c) Certification and review provisions.
    - (1) Certification.
    - (2) Review.
      - (i) [Reserved]
      - (ii) [Reserved]
      - (3) [Reserved]
    - (4) Exception for certain buildings.
      - (i) In general.
      - (ii) Agreement and review.

- (iii) Example.
- (5) Agency reports of compliance monitoring activities.
- (d) Inspection provision.
  - (1) In general.
  - (2) Inspection standard.
  - (3) Exception from inspection provision.
  - (4) Delegation.
- (e) Notification-of-noncompliance provisions.
  - (1) In general.
  - (2) Notice to owner.
  - (3) Notice to Internal Revenue Service.
- (i) In general.
- (ii) Agency retention of records.
- (4) Correction period.
- (f) Delegation of authority.
  - (1) Agencies permitted to delegate compliance monitoring functions.
- (i) In general.
- (ii) Limitations.
  - (2) Agencies permitted to delegate compliance monitoring functions to another Agency.
- (g) Liability.
- (h) Effective/applicability dates.
  - (1) In general.
  - (2) [Reserved]

§1.42-6 Buildings qualifying for carryover allocations.

- (a) Carryover allocations.
  - (1) In general.
  - (2) 10 percent basis requirement.
    - (i) Allocation made before July 1.
    - (ii) Allocation made after June 30.
  - (b) Carryover-allocation basis.
    - (1) In general.
    - (2) Limitations.
      - (i) Taxpayer must have basis in land or depreciable property related to the project.
      - (ii) High cost areas.
      - (iii) Amounts not treated as paid or incurred.
      - (iv) Fees.
    - (3) Reasonably expected basis.
    - (4) Examples.
  - (c) Verification of basis by Agency.
    - (1) Verification requirement.
    - (2) Manner of verification.
    - (3) Time of verification.
      - (i) Allocations made before July 1.
      - (ii) Allocations made after June 30.
  - (d) Requirements for making carryover allocations.

- (1) In general.
- (2) Requirements for allocation.
- (3) Special rules for project-based allocations.
  - (i) In general.
  - (ii) Requirement of section 42(h)(1)(F)(1)(III).
- (4) Recordkeeping requirements.
  - (i) Taxpayer.
  - (ii) Agency.
- (5) Separate procedure for election of appropriate percentage month.
  - (e) Special rules.
- (1) Treatment of partnerships and other flow-through entities.
- (2) Transferees.

§1.42-7 Substantially bond-financed buildings. [Reserved]

§1.42-8 Election of appropriate percentage month.

- (a) Election under section 42(b)(2)(A)(ii)(I) to use the appropriate percentage for the month of a binding agreement.
  - (1) In general.
  - (2) Effect on state housing credit ceiling.
  - (3) Time and manner of making election.
  - (4) Multiple agreements.
    - (i) Rescinded agreements.
    - (ii) Increases in credit.
  - (5) Amount allocated.
  - (6) Procedures.
    - (i) Taxpayer.
    - (ii) Agency.
  - (7) Examples.
- (b) Election under section 42(b)(2)(A)(ii)(II) to use the appropriate percentage for the month tax-exempt bonds are issued.
  - (1) Time and manner of making election.
  - (2) Bonds issued in more than one month.
  - (3) Limitations on appropriate percentage.
  - (4) Procedures.
    - (i) Taxpayer.
    - (ii) Agency.

§1.42-9 For use by the general public.

- (a) General rule.
- (b) Limitations.
- (c) Treatment of units not for use by the general public.

§1.42-10 Utility allowances.

- (a) Inclusion of utility allowances in gross rent.
- (b) Applicable utility allowances.

- (1) Buildings assisted by the Rural Housing Service.
- (2) Buildings with Rural Housing Service assisted tenants.
- (3) Buildings regulated by the Department of Housing and Urban Development.
- (4) Other buildings.
  - (i) Tenants receiving HUD rental assistance.
  - (ii) Other tenants.
- (A) General rule.
- (B) Utility company estimate.
- (C) Agency estimate.
- (D) HUD Utility Schedule Model.
- (E) Energy consumption model.
- (c) Changes in applicable utility allowance.
  - (1) In general.
  - (2) Annual review.
- (d) Record retention.
- (e) Actual consumption submetering arrangements.
  - (1) Definition.
  - (2) Administrative fees.

§1.42-11 Provision of services.

- (a) General rule.
- (b) Services that are optional.
  - (1) General rule.
  - (2) Continual or frequent services.
  - (3) Required services.
- (i) General rule.
- (ii) Exceptions.
- (A) Supportive services.
- (B) Specific project exception.

§1.42-12 Effective dates and transitional rules.

- (a) Effective dates.
  - (1) In general.
  - (2) Community Renewal Tax Relief Act of 2000.
    - (i) In general.
  - (3) Electronic filing simplification changes.
  - (4) Utility allowances.
  - (5) Additional effective dates affecting utility allowances.
- (b) Prior periods.
- (c) Carryover allocations.

§1.42-13 Rules necessary and appropriate; housing credit agencies' correction of administrative errors and omissions.

- (a) Publication of guidance.
- (b) Correcting administrative errors and omissions.
  - (1) In general.

- (2) Administrative errors and omissions described.
- (3) Procedures for correcting administrative errors or omissions.
  - (i) In general.
  - (ii) Specific procedures.
  - (iii) Secretary's prior approval required.
  - (iv) Requesting the Secretary's approval.
  - (v) Agreement to conditions.
  - (vi) Secretary's automatic approval.
  - (vii) How Agency corrects errors or omissions subject to automatic approval.
  - (viii) Other approval procedures.
- (c) Examples.
- (d) Effective date.

§1.42-14 Allocation rules for post-2000 State housing credit ceiling amount.

- (a) State housing credit ceiling.
  - (1) In general.
  - (2) Cost-of-living adjustment.
    - (i) General rule.
    - (ii) Rounding.
  - (b) The unused carryforward component.
  - (c) The population component.
  - (d) The returned credit component.
    - (1) In general.
    - (2) Limitations and special rules.
      - (i) General limitations.
      - (ii) Credit period limitation.
      - (iii) Three-month rule for returned credit.
      - (iv) Returns of credit.
        - (A) Building not qualified within required time period.
        - (B) Noncompliance with terms of the allocation.
        - (C) Mutual consent.
        - (D) Amount not necessary for financial feasibility.
  - (3) Manner of returning credit.
    - (i) Taxpayer notification.
    - (ii) Internal Revenue Service notification.
  - (e) The national pool component.
  - (f) When the State housing credit ceiling is determined.
  - (g) Stacking order.
  - (h) Nonprofit set-aside.
    - (1) Determination of set-aside.
    - (2) Allocation rules.
      - (i) National Pool.
        - (1) In general.
        - (2) Unused housing credit carryover.
        - (3) Qualified State.
          - (i) In general.

- (ii) Exceptions.
  - (A) De minimis amount.
  - (B) Other circumstances.
- (iii) Time and manner for making request.
- (4) Formula for determining the National Pool.
- (j) Coordination between Agencies.
- (k) Example.
- (l) Effective dates.
  - (1) In general.
  - (2) Community Renewal Tax Relief Act of 2000 changes.

§1.42-15 Available unit rule.

- (a) Definitions.
- (b) General section 42(g)(2)(D)(i) rule.
- (c) Exception.
- (d) Effect of current resident moving within building.
- (e) Available unit rule applies separately to each building in a project.
- (f) Result of noncompliance with available unit rule.
- (g) Relationship to tax-exempt bond provisions.
- (h) Examples.
- (i) Effective date.

§1.42-16 Eligible basis reduced by federal grants.

- (a) In general.
- (b) Grants do not include certain rental assistance payments.
- (c) Qualifying rental assistance program.
- (d) Effective date.

§1.42-17 Qualified allocation plan

- (a) Requirements
  - (1) In general [Reserved]
  - (2) Selection criteria [Reserved]
  - (3) Agency evaluation.
  - (4) Timing of Agency evaluation.
- (i) In general.
- (ii) Time limit for placed-in-service evaluation.
- (5) Special rule for final determinations and certifications.
- (6) Bond-financed projects.
- (b) Effective date.

§1.42-18 Qualified Contracts.

- (a) Extended low-income housing commitment.
  - (1) In general.
    - (i) Extended use period.
    - (ii) Termination of extended use period.
    - (iii) Other non-acceptance.

- (iv) Eviction, gross rent increase concerning existing low-income tenants not permitted.
- (2) Exception.
- (b) Definitions.
- (c) Qualified contract purchase price formula.
  - (1) In general.
  - (i) Initial determination.
  - (ii) Mandatory adjustment by the buyer and owner.
  - (iii) Optional adjustment by the Agency and owner.
- (2) Low-income portion amount.
- (3) Outstanding indebtedness.
- (4) Adjusted investor equity.
  - (i) Application of cost-of-living factor.
  - (ii) Unadjusted investor equity.
  - (iii) Qualified-contract cost-of-living adjustment.
- (iv) General rule.
- (v) Provision by the Commissioner of the qualified-contract cost-of-living adjustment.
- (vi) Methodology.
- (vii) Example.
- (5) Other capital contributions.
- (6) Cash distributions.
  - (i) In general.
  - (ii) Excess proceeds.
  - (iii) Anti-abuse rule.
- (d) Administrative discretion and responsibilities of the Agency.
  - (1) In general.
  - (2) Actual offer.
  - (3) Debarment of certain appraisers.
- (e) Effective /applicability date.

Par. 3. Section 1.42-0T is added to read as follows:

§1.42-0T Table of contents.

This section lists the paragraphs contained in §§1.42-5T and 1.42-10T.

§1.42-5T Monitoring compliance with low-income housing credit requirements (temporary).

- (a)(1) through (a)(2)(ii) [Reserved]
- (iii) Effect of guidance published in the Internal Revenue Bulletin.
- (b) through (c)(2)(i) [Reserved]
- (3) Frequency and form of certification.
- (c)(4) through (g) [Reserved]
- (h) Effective/applicability dates.
  - (1) [Reserved]
  - (2) Effective/applicability dates of the REAC inspection protocol.

§1.42-10T Energy obtained directly from renewable sources (temporary).

- (a) through (e)(1)(i)(A) [Reserved]
- (B) Utility not purchased from or through a local utility company.
- (C) Renewable source.
- (2) [Reserved]
- (f) Date of applicability.
- (g) Expiration date.

Par. 4. Section 1.42-10 is amended by:

1. Adding a sentence after the first sentence of paragraph (a).
2. Revising paragraph (b)(3).
3. Revising the first sentence of paragraph (b)(4)(ii)(A).
4. Revising paragraph (b)(4)(ii)(E).
5. Adding paragraph (e).

The additions and revisions read as follows:

§1.42-10 Utility allowances.

(a) \* \* \* For purposes of the preceding sentence, if the cost of a particular utility for a residential unit is paid pursuant to an actual-consumption submetering arrangement within the meaning of paragraph (e)(1) of this section, then that cost is treated as being paid directly by the tenant(s) and not by or through the owner of the building. \* \* \*

(b) \* \* \*

(3) Buildings regulated by the Department of Housing and Urban Development.

If neither a building nor any tenant in the building receives RHS housing assistance, and the rents and utility allowances of the building are regulated by HUD (HUD-regulated buildings), the applicable utility allowance for all rent-restricted units in the building is the applicable HUD utility allowance.



(4) \* \* \*

(ii) \* \* \*

(A) \* \* \* If none of the rules of paragraphs (b)(1), (2), (3), and (4)(i) of this section apply to determine the appropriate utility allowance for a rent-restricted unit, then the appropriate utility allowance for the unit is the applicable PHA utility allowance. \* \* \*

\* \* \* \* \*

(E) Energy consumption model. A building owner may calculate utility estimates using an energy and water and sewage consumption and analysis model (energy consumption model). The energy consumption model must, at a minimum, take into account specific factors including, but not limited to, unit size, building orientation, design and materials, mechanical systems, appliances, characteristics of the building location, and available historical data. The utility consumption estimates must be calculated by a properly licensed engineer or other qualified professional. The qualified professional and the building owner must not be related within the meaning of section 267(b) or 707(b). If a qualified professional is not a properly licensed engineer and if the building owner wants to utilize that qualified professional to calculate utility consumption estimates, then the owner must obtain approval from the Agency that has jurisdiction over the building. Further, regardless of the type of qualified professional, the Agency may approve or disapprove of the energy consumption model or require information before permitting its use. In addition, utility rates used for the energy consumption model must be no older than the rates in place 60 days prior to the beginning of the 90-day period under paragraph (c)(1) of this section.

\* \* \* \* \*

(e) Actual-consumption submetering arrangements--(1) Definition. For purposes of this section, an actual-consumption submetering arrangement for a utility in a residential unit possesses all of the following attributes:

(i) The utility consumed in the unit is described in paragraph (e)(1)(i)(A) of this section or in §1.42-10T(e)(1)(i)(B);

(A) The utility is purchased from or through a local utility company by the building owner (or its agent or other party acting on behalf of the building owner).

(B) [Reserved]. For further guidance see §1.42-10T(e)(1)(i)(B) through (e)(1)(i)(C)(3).

(ii) The tenants in the unit are billed for, and pay the building owner (or its agent or other party acting on behalf of the building owner) for, the unit's consumption of the utility;

(iii) The billed amount reflects the unit's actual consumption of the utility. In the case of sewerage charges, however, if the unit's sewerage charges are combined on the bill with water charges and the sewerage charges are determined based on the actual water consumption of the unit, then the bill is treated as reflecting the actual sewerage consumption of the unit; and

(iv) The rate at which the building owner bills for the utility satisfies the following requirements:

(A) To the extent that the utility consumed is described in paragraph (e)(1)(i)(A) of this section, the utility rate charged to the tenants of the unit does not exceed the rate incurred by the building owner for that utility; and

(B) To the extent that the utility consumed is described in §1.42-10T(e)(1)(i)(B), the utility rate charged to the tenants of the unit does not exceed the rate described in §1.42-10T(e)(1)(iv)(B).

(2) Administrative fees. If the owner charges a unit's tenants a fee for administering an actual-consumption submetering arrangement, the fee is not considered gross rent for purposes of section 42(g)(2). The preceding sentence, however, does not apply unless the fee is computed in the same manner for every unit receiving the same submetered utility service, nor does it apply to any amount by which the aggregate monthly fee or fees for all of the unit's utilities under one or more actual-consumption submetering arrangements exceed the greater of—

(i) Five dollars per month;

(ii) An amount (if any) designated by publication in the Internal Revenue Bulletin (see §601.601(d)(2)(ii) of this chapter); or

(iii) The lesser of—

(A) The dollar amount (if any) specifically prescribed under a State or local law;

or

(B) A maximum amount (if any) designated by publication in the Internal Revenue Bulletin (see §601.601(d)(2)(ii) of this chapter).

Par. 5. Section 1.42-10T is added to read as follows:

§1.42-10T Energy obtained directly from renewable sources (temporary).

(a) through (e)(1)(i)(A) [Reserved]. For further guidance see §1.42-10(a) through (e)(1)(i)(A).

(B) Utility not purchased from or through a local utility company. The utility is not described in §1.42-10(e)(1)(i)(A) and is produced from a renewable source (within the meaning of paragraph (e)(1)(i)(C) of this section).

(C) Renewable source. For purposes of paragraph (e)(1)(i)(B) of this section, a utility is produced from a renewable source if—

(1) It is energy that is produced from energy property described in section 48;

(2) It is energy that is produced from property that is part of a facility described in section 45(d)(1) through (4), (6), (9), or (11); or

(3) It is a utility that is described in guidance published for this purpose in the Internal Revenue Bulletin (see §601.601(d)(2)(ii) of this chapter).

(ii) through (iv)(A) [Reserved]. For further guidance see §1.42-10(e)(1)(ii) through (e)(1)(iv)(A).

(B) The rate described in this paragraph (e)(1)(iv)(B) is the rate at which the local utility company would have charged the tenants in the unit for the utility if that entity had provided it to them.

(2) [Reserved]

(f) Date of applicability. This section applies to a building owner's taxable years beginning on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. A building owner may apply the provisions of this section to the building owner's taxable years beginning before **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

(g) Expiration date. The applicability of this section expires on March 1, 2019.

Par. 6. Section 1.42-12 is amended by adding paragraph (a)(5) to read as follows:

§1.42-12 Effective dates and transitional rules.

(a) \* \* \*

(5) Additional effective dates affecting utility allowances. (i) The following provisions apply to a building owner's taxable years beginning on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**—

- (A) The second sentence in §1.42-10(a);
- (B) Section 1.42-10(b)(3);
- (C) The first sentence in §1.42-10(b)(4)(ii)(A);
- (D) Section 1.42-10(b)(4)(ii)(E); and
- (E) Section 1.42-10(e).

(ii) A building owner may apply these provisions to the building owner's taxable years beginning before **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Otherwise, the utility allowances provisions that apply to taxable years beginning before **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]** are contained in §1.42-10 (see 26 CFR part 1 revised as of April 1, 2015).

John Dalrymple,  
Deputy Commissioner for Services and Enforcement.

Approved: February 8, 2016.

Mark J. Mazur,  
Assistant Secretary of the Treasury (Tax Policy).

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